

**REMARKS**

This Application has been carefully reviewed in light of the Final Office Action mailed June 21, 2004. At the time of the Final Office Action, Claims 1-20 were pending. Applicants add Claim 21. Thus, Claims 1-21 are pending. Applicants respectfully request reconsideration and favorable action in this case.

Applicants note with appreciation the indication by the Examiner that prior rejections under 35 U.S.C. 112 and the objections to the specification are no longer applicable.

**Definition of Claim Terms**

The Office Action alleges that the terms "network element" and "telecommunications network" are "well known in the art as generic germs, i.e., as a computer node in a network that handles voice and/or data communications." *See Office Action*, page 2, ¶ 2. Applicants respectfully disagree. First of all, the Final Office Action suggests that the terms "network element" and "telecommunications network" share a common definition. Also, the Office Action cites no support for this "generic" definition, and Applicants are unaware of the source upon which the Office Action relies upon, for this contention.

Notwithstanding, the specification of the present Application makes Applicants' use of these terms clear. For example, "network element" is referred to in the specification as follows:

The term [network element] refers to hardware only or a combination hardware and software system that is primarily designed to directly perform a telecommunications service function. For example, an [network element] is the part of the network equipment where a transport entity (such as a line, path, or section) is terminated and monitored. *See specification*, page 121, lines 8-11, and page 16, line 32.

Furthermore, the "network element" of a telecommunications network is clearly distinguished from a "network element" or "element manager" of a computer network

in the specification of the present invention. For example, at page 2, lines 5-9, the specification of the present invention indicates:

It should be noted that the terms "element" and "element manager" are also sometimes used in reference to computer networks rather than telecommunications networks. However, the requirements for element management and such networks are vastly different from those relevant to telecommunications networks.

**Official Notice/Common Knowledge**

In the Office Action mailed January 14, 2004 (the "Office Action") and the Final Office Action, the Examiner takes Official Notice of certain facts and/or refers to several facts as "well known in the art", "obvious to one of ordinary skill in the art", "inherent", and/or "common knowledge". Furthermore, the Office Action and Final Office Action define and/or characterize particular terms and phrases, without providing any supporting documentation. For the purposes of this argument, Applicants assume that the Examiner is attempting to take Official Notice with regard to such facts.

The Final Office Action cites *In re Boon*, 439 F.2d 724, as holding that applicants must offer more than a "bald challenge" in order to traverse and/or overcome such Official Notice. See Final Office Action, Page 10, paragraph 28. The Final Office Action also implies that Applicants did not meet the standard for traversing any Official Notice taken by the Examiner in the Office Action. *Id.* Applicants respectfully disagree.

First of all, the Office Action and the Final Office Action cite the wrong standard to apply in traversing Official Notice. *In re Boon* does not refer to the standard under which an Examiner may take Official Notice during prosecution of a patent application. Instead, *In re Boon* indicates that, in certain circumstances, the Board of Appeals may add a reference to the record on appeal, without reopening prosecution, if the reference is used to support Official Notice previously taken by the Examiner during prosecution, and the reference can be said to have played a minor role in prosecution. See *In re Boon*, 439 F.2d at 1039. *In re Boon* does not apply to Official Notice that is taken during prosecution of

a patent application. In fact, the court in *In re Boon* specifically indicates that the reasoning for its holding is that holding otherwise "would effectively destroy any incentive on the part of the Board to clarify or justify a position taken by an examiner through the artful use of facts judicially noticed." *Id* (*Emphasis added*). Thus, the court specifically distinguishes the facts of *In re Boon* from Official Notice taken by an Examiner during prosecution of an application.

The proper standard with regard to when and how an examiner can take official notice and/or deem facts to be common knowledge is defined at MPEP 2144.03 and case law cited therein. For example, MPEP 2144.03 indicates that "while 'official notice' may be relied on, the circumstances should be rare when an application is under final rejection or action under 37 CFR 1.113." See MPEP 2144.03(A), page 2100-136, second column (*emphasis added*.) Moreover, MPEP 2144.03 continues "any rejection based on assertions that a fact is well-known or is common knowledge in the art without documentary evidence to support the examiner's conclusion should be judiciously applied." See MPEP 2144.03(E).

In the Final Office Action, the Examiner appears to rely upon Official Notice regarding each of the following facts:

- "The terms 'network element' and 'telecommunications network' are well known in the art as generic terms, i.e. as a computer node in a network that handles voice and/or data communications." See *Final Office Action*, page 2, paragraph 2.
- "It is well known in the art that voice and data may travel on the same network, or that a voice network may be easily connected to a data network." See *Final Office Action*, page 3, paragraph 4.
- "It is also well known in the art that switches, routers, and the like, are computers and may be treated as such." *Id*.
- "A programmed schedule, as currently drawn in the claims of the instant application, may be a variety of automated processes based on automated triggers that may be

chronological (once a day/first day of month) or procedural (whenever a change to a network element is made).” *See Final Office Action*, page 5, paragraph 12.

- “It is inherent that if data is stored on a disk, it can be read from the disk.” *See Final Office Action*, page 5, paragraph 13.
- “It is inherent, and thus anticipated, that if a file is backed up, it may be recovered through some mechanism.” *Id.*
- “It is well known in the art that a system implementation is functionally equivalent to the underlying method.” *See Final Office Action*, paragraph 15, paragraph 16, paragraph 24, paragraph 29, and paragraph 30.
- “OSI networks, FTAM protocols, or configuration files...are generic.” *See Office Action*, page 7, paragraph 21.
- “It is obvious to one of ordinary skill in the art that restoration of corrupted files is the entire purpose of a file backup system, and thus at issue is the automated discovery and restoration of corrupted files.” *See Final Office Action*, page 9, paragraph 26.
- “The reversal of a process in a computer networking environment was well known in the art at the time the invention was made, with few exceptions being made based on certain configurations such as one-way channels.” *See Final Office Action*, page 9, paragraph 27.
- “It is obvious to one of ordinary skill in the art that the system and method drawn in Claims 5-7 are reversible; i.e., that if data moves from point A to point B, then it can move from point B to point A.” *Id.*
- “It is obvious that if a file is written or backed up, it can be restored.” *Id.*

Thus Applicants respectfully contend that the Official Notice of the Final Office Action is not relied upon in "rare" circumstances, and it is not “judiciously applied” as required by MPEP 2144.03. Furthermore, Applicants respectfully contend that Applicants met their burden, in response to the Office Action, in traversing all Official Notice taken by the Examiner. According to the MPEP, “if applicant challenges a factual assertion as not properly officially noticed or not properly based upon common knowledge, the examiner must support the finding with adequate evidence.” *See MPEP 2144.03(C)*. Applicants

respectfully contend that Applicants provided such an adequate challenge in response to the Office Action.

Again, Applicants respectfully challenge and traverse the Official Notice and/or facts referred to as common knowledge, well known in the art, inherent or obvious to one of ordinary skill in the art, in the Final Office Action. Applicants also traverse the definitions and characterizations of particular terms and phrases discussed above and throughout the Final Office Action. Applicants respectfully request that the Examiner support such findings with adequate evidence.

With regard to the Official Notice of the Final Office Action, that the “reversal of a process in a computer networking environment was well known in the art at the time the invention was made, with few exceptions being made based on certain configurations such as one-way channels”, the Final Office Action suggests that “Applicant must show that it would be difficult to reverse the limitations of Claims 5-7, and thus such a reversal would not be well known in the art”, or, alternatively, “the Applicant must show that the process of *Zulch* in view of *Razzaghe-Ashrafi* cannot be reversed, i.e., that data can move from point A to point B but the data cannot move from point B to point A, and that the restoration process must utilize a method other than the simple reversal of the backup method.” *See Final Office Action, page 3, paragraph 5.* Applicants respectfully disagree. If the Examiner wishes to take Official Notice with regard to these facts, it is not up to Applicants to prove the Examiner wrong. Otherwise, the Examiner is asking Applicants to prove a negative (e.g., that the “facts” stated by the Examiner are untrue). Instead, Applicants respectfully contend that, having traversed the grounds of Official Notice, it is incumbent upon the Examiner to “support the finding with adequate evidence”, as required by MPEP 2143.03(C).

### **Section 102 Rejections**

The Final Office Action rejects Claims 1-4, 12 and 20 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 5,966,760 issued to Zulch (“*Zulch*”). Applicants respectfully traverse these rejections for the reasons stated below.

Claim 1 is directed to a computer/software system for managing telecommunication network elements that includes one or more operator-driven processes which monitor and manage network elements in real time, using at least one telecommunications network control channel. *Zulch* does not disclose, teach, or suggest each of the limitations.

As discussed above, the "network elements" of Claim 1 are defined in the specification and are clearly distinguishable from the computers C<sub>1</sub>-C<sub>6</sub> of the network of *Zulch*.

Furthermore, *Zulch* does not disclose, teach, or suggest at least one "telecommunications network control channel". The Network of *Zulch* is not a telecommunications network, and thus, does not disclose, teach, or suggest a telecommunications network control channel.

Claims 2 and 3 each depend from Claim 1. Therefore, Applicants respectfully contend that Claims 2 and 3 are patentably distinguishable from *Zulch* for example, for the same reasons discussed above with regard to Claim 1.

Claim 4 is directed to a method for managing a plurality of network elements of a telecommunications network that includes coupling a telecommunications network element manager with a plurality of network elements using at least one telecommunications network control channel. As discussed above with regard to Claim 1, *Zulch* does not disclose, teach, or suggest the "network elements" of Claim 4, or the "telecommunications network control channel" of Claim 4. Furthermore, *Zulch* does not disclose, teach, or suggest a telecommunications network element manager, since the network of *Zulch* is not a "telecommunications network", the "network element" of Claim 4 is distinguishable from *Zulch*, and since the specification of the present application clearly distinguishes between a telecommunications network element manager and a computer network element manager. For at least these reasons, Applicants respectfully contend that Claim 4 is patentably distinguishable from *Zulch*.

Claim 12 is directed to a network element manager that includes an interface being operable to communicate with a plurality of telecommunications network elements

using at least one telecommunications network channel. As discussed above with regard to Claim 1, *Zulch* does not disclose, teach, or suggest the “network elements” or “telecommunications network control channel” of Claim 12. For at least these reasons, Applicants respectfully contend that Claim 12 is patentably distinguishable from *Zulch*.

Claim 20 is directed to a telecommunications system that includes a network element manager and a plurality of telecommunications network elements, each network element being coupled for communication with the network element manager using at least one telecommunications network control channel. As discussed above with regard to Claim 1, *Zulch* does not disclose, teach, or suggest the “telecommunications network elements”, “network element manager”, nor the “telecommunications network control channel” of Claim 20. For at least these reasons Applicants respectfully contend that Claim 20 is patentably distinguishable from *Zulch*.

### **Section 103 Rejections**

The Final Office Action rejects Claims 5-7, 13-15 under 35 U.S.C. § 103(a) as being unpatentable over *Zulch* as applied to claims 1-4, 12 and 20 above, and further in view of U.S. Patent No. 6,038,379 issued to Fletcher et al. ("*Fletcher*") and U.S. Patent No. 6,101,533 issued to Brandt et al. ("*Brandt*") and U.S. Patent No. 5,974,547 issued to Klimenko ("*Klimenko*"). Applicants respectfully traverse these rejections for the reasons stated below.

Claims 5-7 each depend, either directly or indirectly, from independent Claim 4. Therefore, Applicants respectfully contend that Claims 5-7 are each patentably distinguishable from the cited portions of the references relied upon by the Examiner, for example, for the same reasons discussed above with regard to Claim 1. The rejections of Claims 5-7 each depend upon the contention of the Office Action that *Zulch* discloses a “network element”, and a “telecommunications network control channel.” As discussed above with regard to Claim 1, Applicants respectfully traverse this contention of the Office Action. For at least these reasons, Applicants respectfully contend that Claims 5-7 are each

patentably distinguishable from the cited portions of the references relied upon by the Office Action.

Similarly, each of Claims 13-15 depend, either directly or indirectly, from independent Claim 12. Applicants respectfully contend that the rejection of Claims 12-15 each rely upon an incorrect characterization of the *Zulch* reference. For the reasons discussed above with regard to Claim 12, Applicants respectfully contend that Claims 13-15 are each patentably distinguishable from the cited portions of the references relied upon by the Office Action.

The Final Office Action rejects Claims 8-11 and 16-19 under 35 U.S.C. § 103(a) as being unpatentable over *Zulch* as applied to claims 1-4, 12 and 20 above, and further in view of U.S. Patent No. 6,330,715 issued to Razzaghe-Ashrafi ("*RazzagheAshrafi*"). Applicants respectfully traverse these rejections for the reasons stated below.

Claims 8-11 each depend, either directly or indirectly, from independent Claim 4. Claims 16-19 each depend, either directly or indirectly, from independent Claim 12. As discussed above with regard to their base claims, these rejections are based upon an improper characterization of the *Zulch* reference. Applicants respectfully contend that *Zulch* does not disclose, teach, or suggest each of the elements of any one of Claims 8-11 and 16-19. For at least these reasons, Applicants respectfully contend that Claims 8-11 and 16-19 are each patentably distinguishable from the cited portions of the references relied upon by the Office Action.

New Claim 21 is patentably distinguishable from the references relied upon by the Office Action in rejecting pending claims, because Claim 21 includes limitations that are not disclosed, taught or suggested by such references. For example, Claim 21 includes the limitations "coupling a telephony network element manager with a plurality of telephony network elements using at least one telephony network control channel." The portions of the references relied upon by the Office Action in rejecting claims do not disclose, teach or suggest each of these limitations. Applicants respectfully contend that Claim 21 is supported



by the specification as originally submitted, for example, Claims 1 and 2, and for the same reasons as Claims 4 and 5.

Conclusions

Applicants have made an earnest attempt to place this case in condition for allowance. For the foregoing reasons, and for other reasons clearly apparent, Applicants respectfully request full allowance of all pending Claims. If the Examiner feels that a telephone conference or an interview would advance prosecution of this Application in any manner, the undersigned attorney for Applicants stand ready to conduct such a conference at the convenience of the Examiner.

A Transmittal with additional fees calculated along with a check in the amount of \$104.00 is hereby attached in order to satisfy the additional claim added. Applicants believe no other fees are due. However, should there be a fee discrepancy, the Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

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